

Legislative facts and section 144 — a contemporary problem?*

The Honourable Justice Peter McClellan AM[†] and Amber Doyle^{††}

In the past, judges have relied on their own observations and assumptions about human behaviour, and the evidence of children was treated with caution as children were considered unreliable witnesses. Judges' assumptions about how complainants behave, and how memory works, became embedded in common law and had consequences for complainants in sexual assault cases. These assumptions have been challenged by the work of the Royal Commission into Institutional Response to Child Sexual Abuse. For example, delay in making complaint, which was once assumed to be an indication of falsity, has been shown to be typical in child sexual abuse. Similarly, the assessment of harm done to the victim for the purposes of sentencing has changed so that there is greater awareness of the effects of child sexual abuse, but can still be problematic if the victim's impact statement is not consistent with the judge's perceptions of harm. This article discusses the means by which courts can use available learning in relation to the sexual abuse of children in the trial and sentencing process, and the effect of s 144 of the Evidence Act 1995 on the operation of the common law doctrine of judicial notice.

Introduction

When delivering the Mayo Lecture at James Cook University in 1996, Sir Anthony Mason commenced by reminding his audience that judges do make law.¹ By that time the theory, which had its supporters, that judges merely discover the law, had been authoritatively assigned by Lord Reid to the land of fairy tales.

Recognition that judges make law brings with it significant questions. How should judges undertake the task? What rules, if any, should apply to them?

* Paper presented at the Supreme Court of New South Wales Annual Conference 2015, 4 September 2015.

† Commissioner, Royal Commission into Institutional Responses to Child Sexual Abuse.

†† Legal officer to the Chair, Royal Commission into Institutional Responses to Child Sexual Abuse.

1 Sir Anthony Mason, "The Judge as Law-maker" (1996) 3 *James Cook University Law Review* 1 at 1.

Do they have the resources necessary to make the “right” laws? In his speech, Sir Anthony acknowledged the benefit to law making which judges gain from their work. Describing judges as having “a unique window on their community”,² Sir Anthony said:

I do not suggest that it is enough for the judge to rely on his or her own experience and common sense. When it comes to the shaping of important legal principles, the judge, more particularly the appellate judge, must take advantage of the learning and techniques of other disciplines, including philosophy, history, economics and social science. These disciplines must supplement the basic foundation which the law (not excluding comparative law) itself provides.³

No one could seriously question Sir Anthony’s proposition. But it begs another question. When judges are making law, how can they access and use the learning of other professions? What should the rules be? When considering whether the obligation of a party to exercise reasonable care for another should be confined to a duty to act without negligence, or whether vicarious or strict liability are appropriate, what information can a court rely on to make the “right” decision? When defining the content of the directions to be given to a jury either generally, or in relation to a particular category of offence, or just in a particular case, how is a court to use the learning from other disciplines to come up with the “right” outcome?

There are of course many issues which judges decide by applying their own knowledge. Matters, which we accept as being within the course of ordinary human experience, pass without comment. However, the concern will always be whether what is accepted to be within ordinary human experience is consistent with the science, if any, relevant to that issue.

The Royal Commission

The Royal Commission is required by its Letters Patent to inquire into institutional responses to allegations and instances of child sexual abuse. As part of our work we must make recommendations to ensure justice for victims by, amongst other means, the provision of redress and through the investigation and prosecution of allegations of abuse.

2 *ibid* at 15.

3 *ibid*.

There are three elements to our work: private sessions, public hearings and research and policy. Private sessions are conducted in accordance with the provisions inserted into the Commonwealth *Royal Commissions Act* 1902 to enable any Commissioner to receive an account of a person's history of abuse. We have now held more than 4800 private sessions. We anticipate requests for many thousands more. There are 1500 already approved and waiting in the queue for their private session.

To date we have held 36 public hearings. Although we have enough material to justify more than 1000 public hearings, we will only be able to hold between 50 and 60.

Our research and policy work covers many topics. A significant component looks at the impacts of abuse on individuals — a matter relevant to both civil and criminal justice. We are also looking at relevant aspects of the criminal trial process, including the troublesome issues of joint trials and tendency and coincidence evidence.

One significant issue is the means by which the courts can use the available learning in relation to the sexual abuse of children in the trial and sentencing process.

The impacts of child sexual abuse

Our work with respect to the impact of abuse has a number of components. Considerable work has been done in gathering and analysing the relevant literature. Beyond this, each private session provides an opportunity for a Commissioner to understand an individual's history of abuse and the impact it has had upon them. An individual's account in a private session cannot be influenced by any expectation of financial gain or retribution for the abuser. The individuals' stories we hear reveal similar behaviour of many perpetrators; they offend in the same way, with similar, frequently significant, and sometimes catastrophic consequences for the victims. The personal accounts of the consequences of abuse are consistent with the conclusions of the academic research.

Sexually abusive behaviour covers a wide range of acts. It is common to hear of the fondling of genitals, masturbation and oral sex. Although less common, vaginal and anal penetration are frequently reported; both digital and by a penis. In some institutions, sexual abuse is accompanied by extraordinary physical brutality and emotional cruelty.

The prevalence of child sexual abuse is difficult to measure. It is believed that as many as 60% of victims never disclose their abuse, and only 5–6% ever report to the authorities.⁴ When victims do disclose their abuse, it is often after significant delay, sometimes taking more than 20 years and sometimes many years more. Males are less likely to disclose their abuse, and are likely to take longer to disclose than females.⁵

Although there are difficulties in gathering accurate statistics, the best Australian evidence drawn from community samples suggests that at least 1.4% and possibly as high as 8% of male children experience penetrative sexual abuse. Non-penetrative abuse is more prevalent — the low estimate being 5.7% and the highest 16%.⁶

The estimates for girls are higher than for boys. The low estimate for penetrative abuse of girls is 4%, the high 12%. The low estimate for non-penetrative abuse is 13.9% the high being 36%.^{6a} The estimates are consistent with international research. The lowest prevalence of child sexual abuse is observed in Asia. For males, the highest is in Africa. For females, the highest is in Australia.⁷

Of significance for this paper is the knowledge we have of the impact of abuse. The assumption that various criminal codes and law enforcement agencies, including the judiciary, and I suspect the majority of the community, make is that sexual abuse with penetration leads to the worst outcomes for victims. The true picture is far more complex. The research evidence, as well as the experience of mental health professionals, finds conflicting support for the assumption that penetration leads to more severe impacts for victims.

One study found that children who had been touched in a sexual way without penetration were more anxious than those who had experienced penetrative abuse.⁸ Other research indicates that penetration can be a

4 T Blakemore, J Herbert and F Arney, *Impacts of institutional child sexual abuse on victims/survivors: A rapid review of research findings*, Australian Government, Sydney (unpublished).

5 *ibid.*

6 Australian Institute of Family Studies, "The prevalence of child abuse and neglect", *CFCA Resource Sheet*, July 2013, at <https://www3.aifs.gov.au/cfca/publications/prevalence-child-abuse-and-neglect>, accessed 27 Jan 2016.

6a *ibid*

7 M Stoltenborgh, M van Ijzendoorn, E Euser and M Bakermans-Kranenburg, "A global perspective on child sexual abuse: meta-analysis of prevalence around the world" (2011) 16(2) *Child Maltreatment* 79–101.

8 Tufts's New England Medical Center Division of Child Psychiatry, *Sexually exploited children: service and research project*, US Department of Justice, Washington DC, 1984.

particular risk factor for later developing severe mental disturbance. The research also suggests that penetration is only one factor affecting the outcome of abuse. Other factors include the betrayal of trust, the amount of violence, and the resulting psychological coercion.⁹

The experience of sexual abuse appears to be different for boys and girls. Girls are more likely than boys to be sexually abused, and unlike most other forms of child victimisation, this risk does not change through the course of childhood and early adolescence.¹⁰ Girls are more likely to experience sexual touching, whereas boys are more likely to experience masturbation and oral and anal abuse. Girls are more likely to be abused by family members — most commonly a stepfather. Boys are more likely to be abused by someone outside of the family — most commonly a family friend. While stranger abuse is a rare event, some studies suggest that boys are about three times more likely to be abused by strangers. Finally, while the abuse of girls tends to be more frequent and occur over a longer time, boys are more likely to be abused by multiple perpetrators.¹¹

Abuse that is accompanied by other forms of maltreatment, such as physical and emotional abuse and neglect, tends to be related to worse outcomes for victims.¹²

The sense of betrayal when a child is abused, even abuse which we would categorise as being at the low end of criminality, by a person who they may have trusted, and the shock accompanying that betrayal, can be the trigger for significant and sometimes catastrophic psychological trauma.

It is important to appreciate that not all children who experience sexual abuse go on to experience poor outcomes in the short or long term. Recent reviews suggest that up to 50% of survivors do not experience clinically significant symptoms.¹³

9 D Finkelhor, "Current information on the scope and nature of child sexual abuse" (1994) 4(2) *The future of children* 31–53.

10 S Smallbone, W Marshall and R Wortley, *Preventing child sexual abuse: evidence, policy and practice*, Routledge, 2011, pp 11–12.

11 *ibid.*

12 For example, compared with women who have not been abused, women with a history of sexual abuse are four times more likely to experience complex trauma later in life. Women who suffered both sexual and physical abuse were more than 14 times more likely to experience complex trauma: S Roth et al, "Complex PTSD in victims exposed to sexual and physical abuse: Results from the DSM-IV field trial for post-traumatic stress disorder" (1997) 10(4) *Journal of Traumatic Stress* 539–555.

13 M Domhardt et al, "Resilience in survivors of child sexual abuse: A systematic review of the literature" (2015) Oct 16(4) *Trauma, Violence, Abuse*, 476–93.

The long-term psychological impacts of abuse are the most commonly studied. This research consistently points to a strong relationship between child sexual abuse and poor mental health in later life. Victims of child sexual abuse are almost four times more likely to have contact with a public mental health facility compared with people in the general community.¹⁴ However, the emergence of symptoms may be significantly delayed. Many victims do not experience psychological problems until an event in their middle life or older ages triggers psychiatric illness which is conclusively diagnosed as being the consequence of their abuse as a child.

The most commonly reported impacts of child sexual abuse are post-traumatic stress disorder ("PTSD"), sexualised behaviours, suicidality and self-harm.¹⁵ A recent study reported the prevalence of PTSD among a sample of sexual abuse survivors to be almost 50%.¹⁶

Other research suggests that victims of child sexual abuse are 18 times more likely than people in the general population to die as a result of self-harm, and almost 50 times more likely to die as a result of accidental drug overdose.¹⁷

Some research indicates that individuals with a history of sexual abuse are more than six times more likely to have a diagnosis of psychosis than those who have not experienced this trauma.¹⁸ Other research indicates that abuse involving penetration is a particular risk factor for developing psychotic and schizophrenic symptoms.¹⁹

Child sexual abuse is associated with increased levels of neurological dysfunction.²⁰ Exposure to abuse or neglect in childhood can modify brain regions as a consequence of excessive exposure to stress hormones and over-

14 M Cutajar, P Mullen, J Ogloff, S Thomas, D Wells and J Spataro, "Suicide and fatal drug overdose in child sexual abuse victims: a historical cohort study" (2010) 192(4) *Med J Aust* 184–187.

15 T Blakemore, J Herbert and F Arney, above n 4.

16 D Tolin and E Foa, "Sex differences in trauma and posttraumatic stress disorder: a quantitative review of 25 years of research" (2006) 132(6) *Psychological Bulletin* 959.

17 M Cutajar, et al, above n 14.

18 J Houston, J Murphy, M Shevlin and G Adamson, "Cannabis use and psychosis: revisiting the role of childhood trauma" (2011) 41(11) *Psychological medicine* 2339–2348.

19 J Cashmore and R Shackel, "The long-term effects of child sexual abuse" (2013) No 11 *Child, Family, Community, Australia*, Australian Institute of Family Studies.

20 S Nunes, M Watanabe, H Morimoto, R Moriya and E Reiche, "The impact of childhood sexual abuse on activation of immunological and neuroendocrine response" (2010) 15(6) *Aggression and Violent Behavior* 440–445.

activation of neurotransmitter systems, especially if the exposure occurs during a key developmental period.²¹

In women with a history of child sexual abuse who were diagnosed with major depression, the hormone responsible for the release of cortisol displayed a six times greater response to stress than controls of the same age.²² In a sample of university-aged participants, girls who were sexually abused but not maltreated in other ways, in comparison with girls who had not been abused at all, showed a reduction in grey matter volume in the area of the brain responsible for processing visual information.²³

Victims of child sexual abuse are more likely to abuse alcohol and other drugs.²⁴

Guilt, shame and anger are commonly reported symptoms among victims of child sexual abuse. This is not surprising given the betrayal of trust and violation of personal boundaries involved in sexual abuse.²⁵ These early experiences can affect the way children, and then adults, understand the motives and behaviours of other people and how they handle stressful life events. The effects can be life-long.

The marital and intimate partner relationships of victims of sexual abuse are often characterised as being unstable and unhealthy. Compared with people who have not been abused, victims report lower relationship satisfaction and poorer communication with partners.²⁶

21 A Tomoda, C Navalta, A Polcari, N Sadato and M Teicher, "Childhood sexual abuse is associated with reduced grey matter volume in visual cortex of young women" (2009) 66(7) *Biological psychiatry* 642–648.

22 C Heim, D Newport, S Heit, Y Graham, M Wilcox, R Bonsall, C Nemeroff, "Pituitary-adrenal and autonomic responses to stress in women after sexual and physical abuse in childhood" (2000) 284(5) *The Journal of the American Medical Association* 592–597.

23 A Tomoda, et al, above n 21.

24 For example, a study conducted with 5,995 Australian twins found that male victims of sexual abuse were almost twice as likely to experience alcohol dependence compared with males with no history of sexual abuse. The effect was even higher for females: compared with non-abused females, females with a history of sexual abuse were almost three times more likely to develop alcohol dependence: Dinwiddie et al, "Early sexual abuse and lifetime psychopathology: a co-twin-control study" (2000) 30(01) *Psychological medicine* 41–52.

25 J Cashmore and R Shackel, above n 19.

26 R Roberts, T O'Connor, J Dunn, J Golding and The ALSPAC Study Team, "The effects of child sexual abuse in later family life; mental health, parenting and adjustment of offspring" (2004) 28(5) *Child Abuse & Neglect* 525–545.

Research also suggests that pregnancy, childbirth and motherhood can trigger emotional distress and a lack of confidence and self-esteem among female survivors. This anxiety and lack of confidence in parenting can contribute to poorer relationships with their children and affect their children's adjustment. There has been comparatively less research with fathers, although the available evidence indicates that male survivors report being over-protective, nervous about physical contact with their children, and fearful of becoming abusers themselves.²⁷

Victims of sexual abuse are more likely to exhibit sexually risky behaviour later in life. Studies have found that child sexual abuse is associated with a greater likelihood of having unprotected sexual intercourse, a greater number of sexual partners, exchanging sex for money, drugs or shelter, and being sexually assaulted later in life.²⁸ Other research suggests that victims of sexual abuse are likely to be younger when they first have intercourse, be younger when they are first diagnosed with a sexually transmitted infection, more likely to have an unintended pregnancy, and less likely to interrupt intercourse despite the risk of pregnancy and sexually transmitted infections.²⁹

Research suggests that children who have been sexually abused are at a greater risk for behavioural problems, running away, vandalism and juvenile offending than those who have not been abused.³⁰ Running away also makes children more likely to commit survival crimes, including stealing and becoming prostitutes.

The victim-offender relationship was examined in a large scale Australian study.³¹ The researchers examined almost 3000 cases of child sexual abuse reported to authorities between 1964 and 1995, and compared them with a non-abused group matched for age and gender. They found that almost a quarter (24%) of child sexual abuse victims had recorded an offence, compared with only 6% of the comparison group.

27 J Cashmore and R Shackel, above n 19.

28 K Arriola, T Loudon, M Doldren and R Fortenberry, "A meta-analysis of the relationship of child sexual abuse to HIV risk behavior among women" (2005) 29(6) *Child Abuse & Neglect* 725–746.

29 J Steel and C Herlitz, "The association between childhood and adolescent sexual abuse and proxies for sexual risk behavior: A random sample of the general population of Sweden" (2005) 29(10) *Child Abuse & Neglect* 1141–1153.

30 J Cashmore and R Shackel, above n 19.

31 J Ogloff, M Cutajar, E Mann, P Mullen, F Wei, H Hassan and T Yih, *Child sexual abuse and subsequent offending and victimisation: A 45 year follow-up study*, Australian Institute of Criminology, 2012.

According to the study, being sexually abused as a child appears to be a risk factor for sexual offending for males, but not for females. Specifically, the study found that 5% (one in 20) of the male victims of child sexual abuse were subsequently convicted of a sexual offence, compared with 0.6% in the comparison group (6 in 1000). The difference was even greater for boys who had been abused after the age of 12: almost one in 10 of these victims were convicted of a sexual offence. By contrast, the probability of being convicted of a sexual offence was low for girls (0.1% or 1 in 1000), regardless of whether they had been abused or not.³²

An often unrecognised impact of child sexual abuse is the adverse effect it can have on the human capital of victims and survivors.³³ While there has been comparatively less research in this area, there is some evidence to suggest that victims of abuse experience poorer academic achievement: they are less likely to achieve secondary school qualifications, gain a higher school certificate, attend university and gain a university degree.³⁴ Maltreatment more broadly has been shown to affect later earnings, with victims of child maltreatment more likely to have very low incomes (less than \$12,000 per year) compared with non-maltreated groups.³⁵

Joint and separate trials — studying the jury

A vexed issue for the criminal justice system is the difficulties posed by the trial of an accused where multiple occasions of offending are alleged. This task is complicated where there are multiple complainants and the prosecution seeks to prove a tendency or pattern of behaviour of the offender.

32 *ibid.*

33 T Blakemore, et al, above n 4.

34 J Boden, L Horwood and D Fergusson, “Exposure to childhood sexual and physical abuse and subsequent educational achievement outcomes” (2007) 31(10) *Child Abuse & Neglect* 1101–1114.

35 J Mersky and J Topitzes, “Comparing early adult outcomes of maltreated and non-maltreated children: A prospective longitudinal investigation” (2010) 32(8) *Children and Youth Services Review* 1086–1096.

This issue is particularly challenging in the context of sexual offences as the common law has considered offences of this kind to be a class for which special care needs to be taken. There is an assumption that allegations of sexual offending are particularly likely to arouse prejudice in the jury.³⁶

The tension between the assumptions by judges and evidence-based decision making is particularly found in this area of offending. How is it that judges know juries react in a way that requires them to exercise particular vigilance? Is this an accurate assumption? Is the rationale for the rules that this assumption mandates a valid one?

To assist in our understanding of how jurors may reason, we are conducting a major jury research program, involving multiple mock trials.³⁷ A trial has been filmed involving multiple counts with multiple complainants. The film has then been edited to allow trials with varying numbers of counts or complainants and appropriate directions to be shown to jurors. The jurors' deliberations have been both observed and filmed and are now being analysed.

This process will allow us to look at the different trial outcomes of joint and separate trials. The study will also allow us to consider and compare the relationship between jurors' perceptions or misconceptions about child sexual abuse, as well as modes of jury deliberation.

The study is also looking at the impact of question trails on juries' reasoning and decisions.

The study uses separate cases of different degrees of prosecutorial strength: one being weak, another being medium and another being strong. There are 1027 individual jurors and 90 juries in total.³⁸ The trials in which the individual juries participated vary.

They included a mix of separate and joint trials, some with relationship or tendency evidence. One variant used a question trail. In some instances, juries were given relationship and tendency directions, and in others they

36 In *KRM v The Queen* (2001) 206 CLR 221 at 254 [97], Kirby J stated that cases involving sexual offences require "particular vigilance" because the circumstances are "peculiarly likely to arouse feelings of prejudice and revulsion" and that these difficulties become especially acute "where there are multiple counts involving numerous events and especially where there is more than one complainant." Judges are obliged, in these circumstances, to act affirmatively to protect the accused in order to secure a fair trial. See also *De Jesus v The Queen* (1986) 68 ALR 1, at 4–5 (Gibbs CJ).

37 The research is being conducted by Professor J Goodman-Delahunty of Charles Sturt University and Dr A Cossins of the University of NSW.

38 Each juror completed pre- and post-trial questionnaires. The jury deliberations are also being subjected to qualitative and quantitative analyses based on researcher observations and transcripts.

were not.³⁹ In addition to the in-person jury simulation, the study was also conducted in an online form.

The preliminary results from the online study shed some light on juror expectations about the information which they expected would be made available to them.

For example, an almost equal proportion expected that they would have been informed if there were other charges against the defendant (48% yes vs 52% no). A similar proportion considered they would have been informed if the defendant had been sexually abusive on other occasions (49% yes vs 51% no).

Nearly 47% of jurors in the online study thought they would have been informed if the defendant had prior convictions for child sexual assault. Forty percent thought they would have been told if the defendant had any prior convictions for any other crime.

There are further interesting results from the online study. When the strong case, which contained three counts of varying degrees of seriousness against a single complainant, was run jointly with the weaker cases, the conviction rates for the less serious charges in the strong case fell. For example, with respect to count 1 in the strong case — masturbation of the complainant — when the strong case was run as a separate trial the conviction rate for this count was 72%. In the joint trial, the conviction rate for this count was 59%. However, for the most serious count in the strong case, the conviction rate increased slightly when the trials were joined: up from 58.5% in the separate trial to 61% in the joint trial.

The early results from the in-person juries are also returning some interesting findings. One of the most interesting is that there is a marked difference in case outcomes where jurors were given a question trail. Two of the separate trials included relationship evidence, but in one of those the jury was also given a question trail. The research indicates that those juries that were given a question trail were far less likely to return a guilty verdict. With a question trail the conviction rate was 30%. For the same trial, but without a question trail, the conviction rate was 66%.

39 Although the latter does not reflect practice, that is to say in matters where such evidence is adduced it would always require a judicial direction, the inclusion of these additions allows the researches to assess the impact of directions on the juries' reasoning. Similarly, with joint trials, a range of conditions was used to test the impact of tendency evidence and question trails on juries' reasoning.

Perhaps less surprising is the finding that trials, where relationship evidence was adduced, resulted in an increased number of convictions, and trials where tendency evidence was led, more guilty verdicts were returned.

Researchers observing the in-person deliberations noted that legal terminology was challenging for some juries. Numbers are still being analysed, but some juries construed oral evidence as hearsay, and considered it an inadequate basis upon which to deliver a guilty verdict. Some juries were confused by the counts involving digital and oral penetration being defined as “sexual intercourse”.

The researchers are still in the early stages of analysing the results from the in-person studies. We should soon have a detailed quantitative results from all 90 juries. We hope to learn more about the impact of joint trials on trial outcomes compared with trials run separately. We are also keen to know whether there were any in-person juries in joint trials that did not consider either individual complainants or individual counts. We will also have the researchers’ analysis in relation to the manner in which juries used tendency and relationship evidence, as well as any thoughts on why question trails led to significantly higher numbers of “not guilty” verdicts.

The capacity of the Royal Commission to undertake a research project of this type is of course not, at least presently, available to courts. However, both best practice and informed reflection confirm that we need a mechanism by which judges can absorb knowledge from disciplines outside the law that should legitimately inform its content. If legal rules and policy are based on understandings of human behaviour that are misguided or erroneous, this must affect the capacity of the criminal justice system to secure justice.

Law and psychology — a history

The practice of judges relying on their own understandings of human behaviour to inform the content of legal rules is centuries old. The practice of judges, at least explicitly, relying on scientific research to inform legal rules has a much more complicated history.

In the mid-1700s, the English jurist, Sir William Blackstone, discussed the common law approach to a provoked killing. His words reflect the values of the 18th century but remain relevant, at least in some Australian States, today. He said “if a man be greatly provoked, as by pulling his nose, or other great indignity, and immediately kills the aggressor” then the law “pa[id] ... regard to human frailty” and the killer was convicted of manslaughter.

If, however, there was “a sufficient cooling-time for passion to subside and reason to interpose” then the defence would fail and the killing would be murder.⁴⁰

Contrast the contemporary relevance of those words about provocation with Blackstone’s understanding of the truthfulness of a woman alleging sexual assault. He said:

if the witness be of good fame; if she presently discovered the offence, and made search for the offender ... these and the like are concurring circumstances, which give greater probability to her evidence. But, on the other side, if she be of evil fame, and stand unsupported by others; if she concealed the injury for a considerable time after she had the opportunity to complain; if the place, where the act was alleged to be committed, was where it was possible she might have been heard, and she made no outcry; these and the like circumstances carry a strong, but not conclusive, presumption that her testimony is false or feigned.⁴¹

The seeds of later and erroneous approaches to issues of sexual assault can be seen in these remarks. Approximately two centuries later, a majority of the High Court cited with approval the following statement:

it is really dangerous to convict on the evidence of the woman or girl alone. This is dangerous because human experience has shown that in these Courts girls and women sometimes tell an entirely false story which is very easy to fabricate, but extremely difficult to refute.⁴²

In 1879, an event occurred of fundamental importance in the development of our understanding of human behaviour. In Leipzig, the first laboratory solely dedicated to psychological research was founded by Wilhelm Wundt. In that laboratory, Wundt and his students developed the empirical methodologies that allowed psychology to emerge as a discipline distinct from philosophy.⁴³ The question was how would the law respond to the birth of the new science whose area of focus — human behaviour — was central to so many aspects of the law itself.

40 *Blackstone’s Commentaries on the Laws of England*, 1st edn, Dublin, [1770] bk 4, c 14, p 191.

41 *ibid.*, pp 213–4.

42 *R v Henry* (1968) 53 Cr App R 150, at 153 (Lord Salmon) cited with approval by a majority of the High Court in *Kelleher v The Queen* (1974) 131 CLR 534, Barwick CJ at 543, Gibbs J at 553, Mason J at 559.

43 A Kim, “Wilhelm Maximilian Wundt”, *Stanford Encyclopedia of Philosophy*, E Zalta (ed), Winter 2014 Edition at <http://plato.stanford.edu/entries/wilhelm-wundt/>, accessed 18 January 2016.

Matters moved relatively quickly. Less than two decades after the formation of Wundt's laboratory, a murder trial in Munich saw what was probably the first testimony given by a psychological expert.⁴⁴ And in Vienna, in 1906 Freud gave a series of lectures to judges discussing the lessons psychology might offer the law in the context of fact finding.⁴⁵

Despite these promising beginnings, by 1908 it was evident that the law was largely indifferent to the way in which psychology might be applied within its domain. That year Hugo Munsterberg, who had been a student of Wundt's in Leipzig⁴⁶ before moving to the United States to run the psychological laboratory at Harvard, published a book entitled *On the witness stand: essays on psychology and crime*. Munsterberg was a strong advocate of forensic psychology and in particular psychological testimony. He had himself served as psychological consultant in two murder trials in the US.⁴⁷ In his book, Munsterberg described how experimental psychology had sufficiently matured to the point where it could now be deployed to serve "the practical needs of life":⁴⁸ education, medicine, art, economics and the law.⁴⁹ But whilst the other disciplines had embraced psychology:

The lawyer alone is obdurate. The lawyer and the judge and the jurymen are sure that they do not need the experimental psychologist. They do not wish to see that in this field pre-eminently applied experimental psychology has made long strides ... They go on thinking that their legal instinct and their common sense supplies them with all that is needed and somewhat more.⁵⁰

As far as the law was concerned, human behaviour was directly observable. Our common sense, together with a judicial wisdom derived from legal experience, was more than adequate. This sentiment is captured in the words of Lawton LJ in *R v Turner*, who said that, "[j]urors do not need psychiatrists to tell them how ordinary folk who are not suffering from mental illness are likely to react to the stresses and strains of life".⁵¹

44 R Mackay, A Colman and P Thorton, "The admissibility of expert psychological and psychiatric testimony" in A Heaton-Armstrong, E Shepherd and D Wolchover (eds), *Analysing witness testimony: a guide for legal practitioners and other professionals*, Blackstone Press Limited, 1999, p 322.

45 A Kapardis, *Psychology and the Law: A Critical Introduction*, 4th edn, Cambridge University Press, 2014, p 3.

46 H Munsterberg, *On the witness stand: essays on psychology and crime*, The McClure Co, 1908, p 4.

47 R Mackay, A Colman and P Thorton, above n 44, p 322.

48 H Munsterberg, above n 46, p 8.

49 *ibid* p 9.

50 *ibid*, pp 10–11.

51 [1975] QB 834, at 841.

Despite the advances psychology was making and the insights it was generating, judges continued to rely on their own observations and assumptions about human behaviour. The evidence of children, for example, was to be treated suspiciously because of “the possibility of a young child having a mistaken recollection of what happened”.⁵²

Standard legal texts contained quasi-psychological explanations of criminal behaviour. Discussing the relevance of post-offence behaviour to a determination of guilt in *Zoneff*, Kirby J referred to the 1940 writings of Wigmore who hypothesised that, just as the commission of a crime leaves “traces of blood, wounds or rent clothing, which point back to the deed as done by him”, it will also leave “mental traces” which will manifest in subsequent conduct of the criminal.⁵³

Some of the assumptions judges make may be sound. Some accord neatly with a “common sense” view that would be prevalent in the wider community. But how do we know that our assumptions are correct?

Judicial notice and legislative facts

The common law developed the concept of judicial notice to allow judges to draw on their own knowledge when deciding the facts in an individual case. It also allows them to deploy their knowledge of the world when developing the law.

The doctrine has been justified as both time saving and necessary to prevent a party from inducing a false result in a case. It has also been justified as being of assistance to a court when defining and developing the common law or when determining the constitutional validity of legislation.

The academic literature and judicial pronouncements, although limited, have defined two types of facts — adjudicative facts and legislative facts. Adjudicative facts are facts which are in issue or relevant to a fact in issue.⁵⁴ Legislative facts are those which help to determine what a common law rule should be or how a statute should be construed.⁵⁵ In *Aytugrul v The Queen*, Heydon J described legislative facts as revealing “how existing rules work and how rules which do not exist might work if they were adopted”.⁵⁶

52 *R v Pitts* (1913) 8 Cr App R 126 at 128.

53 *Zoneff v The Queen* (2000) 200 CLR 234, 258–9 [61] citing J Wigmore, *Wigmore on evidence*, 3rd edn, Little, Brown, Boston, 1940.

54 *Aytugrul v The Queen* (2012) 247 CLR 170, Heydon J at [70].

55 *ibid* at [71].

56 *ibid*.

Legislative facts are sometimes referred to as “social policy information” although to my mind this tends to diminish their real character.

In 1955, the American legal academic, Kenneth Culp Davis, published an article titled “Judicial Notice” in the *Columbia Law Review*. The purpose, for Davis, in writing this article was to express his concern with judicial notice provisions then being proposed in the US for the Model Code of Evidence and the Uniform Rules of Evidence, provisions Davis regarded as “seriously and fundamentally unsound”.⁵⁷ Davis was concerned that the distinction between legislative and adjudicative facts should be recognised and maintained because the formulation of law and policy “obviously gains strength to the extent that information replaces guesswork or ignorance or intuition or general impressions. Questions of law and policy often yield to comprehensive factual study”.⁵⁸

Rule 201 of the United States Federal Rules of Evidence was made in 1975. The rule deals with adjudicative facts, but expressly excludes legislative facts.

Under r 201, before judicial notice may be taken of an adjudicative fact it must be a fact “that is not subject to reasonable dispute”.⁵⁹ Subclause (e) provides a right to be heard “on the propriety of taking judicial notice and the nature of the fact to be noticed”. Of passing interest is the obligation in subcl (f) which requires the jury in a civil case to accept the noticed fact as conclusive. The jury has the option of not accepting the fact as conclusive in a criminal trial.

57 K Davis, “Judicial Notice” (1955) 55 *Columbia Law Review* 945.

58 Davis, *ibid* at 953. Similarly Carter has stated: “why should a judge, when seeking to make himself better qualified to formulate a rational and policy-orientated proposition of law, be restricted in his relevant factual investigations to consideration of facts which are either notorious or readily ascertainable? Conscientious and worthwhile research knows no such limits. Judicial notice of legislative facts is a misnomer, for it is undesirable that a judge, when surveying what may well be a wide range of facts of possible significance in the law making process, should (and indeed unrealistic to suppose that he could) draw any rigid distinction or clear-cut distinction between facts which, were they in issue or relevant, would have to be proved and those which he would notice without proof. An attempt to clothe legislative fact-finding in the strait-jacket which befits judicial notice of adjudicative facts is not apt and is barely meaningful.”: P Carter, “Judicial Notice: Related and Unrelated Matters” E Campbell and L Waller (eds), *Well and Truly Tried*, Law Book Co, 1982, pp 93–94 cited in J D Heydon, *Cross on Evidence*, 10th edn, LexisNexis, 2015 at p 218.

59 *Federal Rules of Evidence*, R 201(b) (US).

The notes to the rule are instructive. Drawing upon the work of Professor Davis, the authors discuss the reason for distinguishing legislative and adjudicative facts. The concern is that judge-made law may stop growing if judges could rely only on matters “clearly within the domain of the indisputable”. When considering questions of law and policy, judges should take into account facts they believe. In the words of Professor Davis, “[f]acts most needed in thinking about difficult problems of law and policy have a way of being outside the domain of the clearly indisputable”.⁶⁰

Judicial notice in Australia

Close analysis of the role of judicial notice, both the actual process and any possible modifications, seems to have come later in Australia than in the United States. The distinction has, however, had particular significance in the realm of constitutional law for many decades.⁶¹

The High Court has long held that the court is not bound by ordinary rules of evidence when ascertaining the facts required to make assessments of constitutional validity.⁶²

60 K Davis, “A system of judicial notice based on fairness and convenience” in Roscoe Pound et al (eds) *Perspectives of Law*, Little, Brown, 1964, p 82 cited in Notes of Advisory Committee on Proposed Rules. The dilemma is illustrated by the decision in *Hawkins v United States*, 358 US 74 (1958). In that case the court refused to overturn the rule at common law that one spouse could not testify against the other stating “[a]dverse testimony given in criminal proceedings would, we think, be likely to destroy any marriage.” The notes to r 201 assert that this factual assertion is “scarcely indisputable”.

61 See Heydon, above n 58, pp 199–209; B Selway, “The use of history and other facts in the reasoning of the High Court in Australia” (2001) 20 *University of Tasmania Law Review* 129.

62 See *Breen v Sneddon* (1961) 106 CLR 406, at 411–12 (Dixon CJ): “the distinction between, on the one hand, ordinary questions of fact which arise between the parties because one asserts and the other denies that events have occurred bringing one of them within some criterion of liability or excuse set up by the law and, on the other hand, matters of fact upon which under our peculiar federal system the constitutional validity of some general law may depend. Matters of the latter description cannot and do not form issues between parties to be tried like the former questions. They simply involve information which the Court should have in order to judge properly of the validity of this or that statute or of this or that application by the Executive Government of State or Commonwealth of some power or authority it asserts. In *Commonwealth Freighters Pty Ltd v Sneddon* the following passage in what I said deals with the question: “Highly inconvenient as it may be, it is true of some legislative powers limited by definition, whether according to subject matter, to purpose or otherwise, that the validity of the exercise of the power must sometimes depend on facts, facts which somehow must be

More significantly, for present purposes, in *Woods v Multi-Sport Holdings Pty Ltd*, McHugh J said:

As Brennan J pointed out in *Gerhardy v Brown*, a court that is considering the validity or scope of a law “is not bound to reach its decision in the same way as it does when it tries an issue of fact between the parties”. Whether the law is a Constitution, a legislative enactment or a principle or rule of the common law or equity the “validity and scope of a law cannot be made to depend on the course of private litigation”.⁶³

Similarly, in *R v Henry*, Spigelman CJ said that:

The means of acquiring information for the purposes of policy development should not be confined by the rules of evidence developed for fact finding with respect to matters that only concern the parties to a particular case.⁶⁴

In *Woods v Multi-Sport Holdings Pty Ltd*, McHugh J further stated that, “[o]n countless occasions, Justices of this Court have used material, extraneous to the record, in determining the validity and scope of legal rules and principles. They have frequently relied on reports, studies, articles and books resulting from their own research after the case has been reserved and parties have made their submissions”.⁶⁵

62 continued from previous page

ascertained by the court responsible for deciding the validity of the law. ... if a criterion of constitutional validity consists in matter of fact, the fact must be ascertained by the court as best it can, when the court is called upon to pronounce upon validity.” See also *North Eastern Dairy Co Ltd v Dairy Industry Authority of NSW* (1975) 134 CLR 559 at 622 (Jacobs J): “The court reaches the necessary conclusions of fact largely on the basis of its knowledge of the society of which it is a part. The supplementing of that knowledge is a process which does not readily lend itself to the normal procedures for the reception of evidence.”; the judgments of Brennan J in *South Australia v Tanner* (1989) 166 CLR 161 at 179 and as Chief Justice in *Levy v Victoria* (1997) 189 CLR 579 at 598–599; the judgment of Gageler J in *Maloney v The Queen* (2013) 252 CLR 168 at [351]; and the judgment of Gaudron, Gummow and Hayne JJ in *Austin v Commonwealth* (2003) 215 CLR 185 at [124].

63 (2002) 208 CLR 460, at [65]. See also *Maloney v The Queen* *ibid*, at [352]–[353] (Gageler J): “The nature of legislative facts and the nature of the duty of a court to ascertain them tell against any a priori constraint on the sources from which the court may inform itself. The sources may, but need not, be ‘official’. It is desirable, but not inevitable, that they be ‘public or authoritative’. ... Subject to the requirements of procedural fairness inherent in the judicial process, the ultimate criterion governing the use of information from any source is that a court is able to consider the material sufficiently probative of the legislative fact to be found.”

64 (1999) 46 NSWLR 346 at [60].

65 (2002) 208 CLR 460 at [67]. See also *Doggett v The Queen* (2001) 208 CLR 343, at [126] (Kirby J): “[i]t would not ordinarily be expected that jurors would be aware of the findings of experimental psychology or of the common experience of forensic contests, and other data supporting the reflections about memory, mentioned in *Longman*. Judges, on the other hand are, or should be, aware of such matters.”

Other judges, for example Callinan J, have taken a different view.⁶⁶ His Honour would “resist any suggestion that the same degree of caution is not required when extrinsic facts are so called legislative facts”.⁶⁷ This was so for two reasons. The first was that procedural fairness required parties to be given an opportunity to deal with all matters regarded as material by the court. The second was “that rarely is there any universal acceptance of what are true history, politics and social ethics”.⁶⁸

The search for consistency in the application of the common law doctrine of judicial notice to fact finding in Australia is destined for failure. It is a matter on which judicial minds have differed. The application of the doctrine by the High Court has been described as “erratic”,⁶⁹ and has been criticised on the basis that “many of the cases appear to have departed from the principle in pursuit of convenience”.⁷⁰ It also provides little clarity for counsel as to what, if any, non-legal material they should put before the court. The former Chief Justice of South Australia, the Honourable John Doyle AC QC, once described it as:

a hit and miss affair, depending on the predilections and interests of the counsel and solicitors involved. Certainly there is no protocol or systematic approach governing the matter. ...

The patchy approach to informing the Court on non-legal matters casts a shadow over the Court’s claim to discern and interpret the values and social interests involved.⁷¹

66 *Woods v Multi-Sport Holdings Pty Ltd* (2002) 208 CLR 460 at [163]; See also J Heydon, above n 58, pp 162–163.

67 *ibid*, at [163].

68 *ibid*, at [165]. However, not all judges have taken the view that, in the legislative fact context, in order for judicial notice to be taken, the facts must be universally accepted. Heydon J has said that courts “have resorted to legislative facts even though they could not be said to be ‘not reasonably open to question’ because minds differ about them”: *Aytugrul v The Queen* (2012) 247 CLR 170, at 203 [74].

69 I Freckelton, “Judicial Notice” in I Freckelton and H Selby, *Expert evidence: law, practice, procedure and advocacy*, 5th edn, Thomson Reuters, 2013, p 164.

70 *ibid*, p 165. See also K Burns, “The way the world is: social facts in High Court negligence cases” (2004) 12 *Torts Law Journal* 215 at 221.

71 J Doyle, “Judicial law making — Is honesty the best policy” (1995) 17 *Adelaide Law Review* 161 at 208.

“Ordinary human behaviour”

“Ordinary human behaviour” is a particular category of fact that traditionally may be judicially noticed without inquiry. In *M v The Queen*, Gaudron J noticed that child victims of sexual assault may be reluctant to resist the offender or to protest, and reluctant also to complain for fear that they may be rejected or punished by the offender.⁷² It is interesting that her Honour considered such an observation so notorious and well accepted that it fell into the judicial notice exception. It was, of course, contrary to decades of judicial comment in respect of absence of complaint which assumed the very opposite.

What reflects “ordinary human behaviour” is, without knowledge from science, a matter of subjective opinion. Consider differences in the way judges approach their capacity to “know” how teenagers behave. *M v The Queen* was an appeal against conviction for a number of sexual offences committed against a complainant who was 13 years old at the time of the alleged offences. In that case, McHugh J expressed doubt as to the capacity of judges to assess teenage behaviour, stating:

Attitudes towards sexual matters and behaviour of young people have changed so much in recent years that in many instances the views of appellate judges about how teenagers behave, derived from their own past conduct with teenagers, may well be out of date.⁷³

For McHugh J, the jury, with its assumed collective experience, was in a better position than the High Court, to evaluate the evidence and conduct of a 13 year old.

The contrary position was taken by the Full Court of the High Court in *Phillips v The Queen*.⁷⁴ In that case, the court relied on its own assessment of how teenagers behave to determine that the accused’s pattern of behaviour was not sufficiently unusual, and therefore not sufficiently probative to justify its admission as similar fact evidence. This decision precluded the jury from making its own assessment of the behaviour of the accused and its possible probative value.

72 (1994) 181 CLR 487 at 515. This is cited by McHugh J in *Woods v Multi-Sport Holdings Pty Ltd* (2002) 208 CLR 460 at [66] as an example of “Notorious facts judicially noticed without inquiry” and in Heydon, above n 58, at p 167.

73 (1994) 181 CLR 487 at 529.

74 (2006) 225 CLR 303.

Gleeson CJ, Gummow, Kirby, Hayne and Heydon JJ stated:

The similarities relied on were not merely not “striking”, they were entirely unremarkable. That a male teenager might seek sexual activity with girls about his own age with most of whom he was acquainted, and seek it consensually in the first instance, is not particularly probative. Nor is the appellant’s desire for oral sex, his approaches to the complainants on social occasions and after some of them had ingested alcohol or other drugs, his engineering of opportunities for them to be alone with him, and the different degrees of violence he employed in some instances. His recklessness in persisting with this conduct near other people who might be attracted by vocal protests is also unremarkable and not uncommon.⁷⁵

Delayed complaint

The common law developed special rules for dealing with complaint in the context of sexual assault, in particular, in circumstances where there was a delay between the occurrence of the assault and the time at which a complaint was made. A judge was required to warn the jury that delayed complaint was relevant to the jury’s assessment of the credibility of the complainant.⁷⁶

To take a concrete example, the following remarks were made by a judge of the NSW District Court in a sexual assault trial in the mid-1990s:

If events such as these occur one expects some complaint to be made and that such a complaint is made within a reasonably early stage of the events themselves. Take for example an allegation that someone was raped and the complaint is made a year later. That, in the eyes of everybody, would cast some suspicion on the acceptability of the allegation.⁷⁷

⁷⁵ *ibid*, at [56].

⁷⁶ The rule as stated by Barwick CJ in *Kilby v The Queen* (1973) 129 CLR 460 at 465 was that “[i]t would be no doubt proper for a trial judge to instruct a jury that in evaluating the evidence of a woman who claims to have been the victim of rape and in determining whether to believe her, they could take into account that she had made no complaint at the earliest reasonable opportunity. Indeed, in my opinion, such a direction would not only be proper but, depending of course on the particular circumstances of the case, ought as a general rule be given.”

⁷⁷ NSW Department for Women, *Heroines of Fortitude: The experience of women in court as victims of sexual assault*, Department for Women, November 1996, 211. This statement was recorded in a sexual assault hearing in the District Court of NSW held between 1 May 1994 and 30 April 1995.

The rationale for this rule was the “general assumption that the victim of sexual offences will complain at the first reasonable opportunity, and that, if complaint is not then made a subsequent complaint is likely to be false”.⁷⁸ The common law equated delay with falsity because of how judges assumed genuine victims of sexual offences behaved. The assumption was derived from the medieval doctrine of “hue and cry”.⁷⁹

Research, including work being undertaken by the Royal Commission, has discredited this assumption.⁸⁰ Delay in complaint is typical rather than unusual, particularly in the context of child sexual abuse.⁸¹ Most children who are sexually abused do not reveal their abuse in childhood.⁸² Research has eroded any factual basis on which a general requirement to direct a jury that delay is relevant to credibility could have been justified.

In response to concerns about the assumptions in the common law, State Parliaments enacted legislation, requiring judges to warn juries that delay in complaint was not necessarily indicative that an allegation was false, and that there may be good reasons for a complainant to delay making a complaint. The effect of these provisions was modified by decisions of the High Court, particularly *Crofts v The Queen*.⁸³

The court in *Crofts*⁸⁴ held that the relevant legislative amendments had not abrogated the common law requirement to give, what had become known as, a *Kilby* direction.⁸⁵ Failure to give a direction in accordance with *Kilby* — that delay in complaint was a relevant matter in assessing the complainant’s credibility — meant that the direction given by the trial judge was “unbalanced”.⁸⁶ The joint reasons said:

78 *Graham v The Queen* (1988) 195 CLR 606 at [12] (Gaudron, Gummow and Hayne JJ).

79 Australian Law Reform Commission, *Uniform Evidence Law*, Report No 102, Australian Law Reform Commission, Sydney 2005, [18.72]. This was a joint report of the ALRC, NSWLRC and VLRC.

80 *ibid*, at [18.153], [18.155], [18.169]–[18.170].

81 *ibid*; A Cossins, “Time Out for *Longman*: myths, science and the common law” (2010) 34(1) *Melbourne University Law Review* 69, at 70–83.

82 K London, M Bruck, S Ceci, D Shuman, “Disclosure of child sexual abuse: What does the research tell us about the ways children tell?” (2005) 11(1) *Psychology, Public Policy and Law* 194 cited in H Donnelly, “Delay and the credibility of complainants in sexual assault proceedings” (2007) 19(3) *Judicial Officers’ Bulletin* 20–21.

83 See ALRC, above n 79, at [18.74].

84 (1996) 186 CLR 427.

85 *ibid*, at 451.

86 *ibid*, at 452.

It would require much clearer language ... to oblige a judge, in a case otherwise calling for comment, to refrain from drawing to the notice of the jury aspects of the facts of the case which, on ordinary human experience, would be material to the evaluation of those facts.⁸⁷

Post-*Crofts*, amendments were made to the *Crimes Act* 1958 (Vic) to add a “sufficient evidence” test. A Victorian court could no longer warn, or suggest to the jury, that the credibility of the complainant was affected by delay, unless the judge was satisfied that there was sufficient evidence to suggest that the credibility of the complainant was so affected to justify the giving of a such a warning.⁸⁸ The sufficient evidence test has found its way into similar provisions in NSW.⁸⁹ In order to determine whether to give a warning, judges must have an accurate understanding of the relevance of delay to an assessment of the complainant’s credibility. Without this, it is difficult to give content to a “sufficient evidence” test.

The law, with respect to delayed complaint, has also favoured the accused as a consequence of the decision in *Longman v The Queen*⁹⁰ and the subsequent decisions that confirmed and extended its application.⁹¹ The alleged abuse in *Longman* occurred when the complainant was aged between six and 10. The court determined that a strongly worded warning should be given in circumstances of delayed complaint, as the accused would have inevitably suffered a forensic disadvantage which the jury would not be aware of without the assistance of the judge.⁹²

The precise content to be given to a *Longman* warning was a matter that judges had some difficulty grappling with. The warning set out in the joint reasons was complicated by observations made by Deane and McHugh JJ in their respective judgments as to why they each felt a warning was necessary

87 *ibid*, at 451 (Toohey, Gaudron, Gummow and Kirby JJ) (emphasis added). That *Crofts* itself was a case that required a balancing direction has proved controversial. As the complainant was aged between 10 and 16 at the time of the alleged offences, *Crofts* became authority for proposition that a *Kilby* direction should generally be given in the child sexual assault context. This application of *Kilby* has attracted criticism from other members of the judiciary, on the basis that there was no valid reason to justify this direction being given in this context, in particular Howie J in *R v LTP* [2004] NSWCCA 109 at [123] and Wood CJ at CL in *R v Markuleski* (2001) 52 NSWLR 82 at [244].

88 Section 61(1)(b)(ii). These provisions have since been repealed. The regime set out in the *Jury Directions Act* 2015 (Vic), Pt 5 Div 2 now applies.

89 *Criminal Procedure Act* 1986 (NSW) s 294(2)(c).

90 (1989) 168 CLR 79.

91 See *Crampton v The Queen* (2000) 206 CLR 161; *Doggett v The Queen* (2001) 208 CLR 343.

92 *above* n 90, at 91.

in that case. Deane J said, “[t]he possibility of child fantasy about sexual matters, particularly in relation to occurrences when the child is half-asleep or between periods of sleep, cannot be ignored”, and stated that, “[t]he long passage of time can harden fantasy or semi-fantasy into the absolute conviction of reality.”⁹³ McHugh J stated that, “[t]he fallibility of human recollection and the effect of imagination, emotion, prejudice and suggestion on the capacity to ‘remember’ is well documented”, and that “[r]ecollection of events which occurred in childhood is particularly susceptible to error and is also subject to the possibility that it may not even be genuine”.⁹⁴ For these remarks Deane and McHugh JJ cite no judicial authority. Deane J cites no scientific or extra-judicial material. McHugh J cites a single book, *Memory*, published in 1964. These observations were subsequently shown by evidence to be of doubtful accuracy.⁹⁵ In *Crampton v The Queen*, Gaudron, Gummow and Callinan JJ appeared to state that the observations of Deane and McHugh JJ should be incorporated into the *Longman* warning. Their Honours held that this was a case in which the trial judge should have drawn to the attention of the jury the “additional considerations mentioned by Deane and McHugh JJ in *Longman*”; specifically, “the fragility of youthful recollection” and “the possibility of distortion”.⁹⁶

The observations made by Deane and McHugh JJ about childhood memory have not been accepted without critical judicial comment. In *JJB v R*, Spigelman CJ stated:

Many judges share a conventional wisdom about human behaviour, which may represent the limitations of their background. This has been shown to be so in sexual assault cases.⁹⁷

Legislative intervention was required to overcome the tendency of male judges to treat sexual assault complainants as prone to be unreliable. The observations of Deane J and McHugh J in *Longman* reflect a similar legal tradition that treated children as unreliable witnesses. ...

There is a substantial body of psychological research indicating that children, even very young children, give reliable evidence.⁹⁸ These are complex issues, as reflected in reviews of the research on the ability of young

93 *ibid* at 101.

94 *ibid*, at 107–108.

95 ALRC, above n 79, at [18.126].

96 (2000) 206 CLR 161 at [45].

97 See *R v Johnston* (1998) 45 NSWLR 362 at 367–368.

98 See for example the references in A Ligertwood, *Australian Evidence*, 4th edn, LexisNexis Butterworths, 2004 para 7.31 fn 110 and 111.

children to distinguish fantasy from reality.⁹⁹ The same is true of research about a child's ability to recall accurately stressful events.¹⁰⁰

The complexity of these issues is not reflected in the observations of Deane J and McHugh J in *Longman*, which should, accordingly, be treated with caution.¹⁰¹

The decisions in *Longman* and *Crofts* had profound consequences for complainants in sexual assault cases; particularly complainants who were children at the time at which they were assaulted. They derive from what judges thought they knew about how genuine complainants behaved, and what they thought they knew about how memory worked. Those assumptions have turned out, with the benefit of empirical research, to be flawed. However, they became embedded in the fabric of the common law and proved difficult, even for Parliament, to dislodge.

The assessment of harm and the sentencing process

The issue of what judges know, how they come to know it, and the accuracy of that knowledge is also important in the sentencing process. For example, what judges know, or think they know, about the harm caused by child sexual abuse will, through the application of sentencing law and principle, become a determinative factor in the sentence an offender receives. When imposing a judicial evaluation on the evidence of harm, are judges in fact, taking judicial notice of the relationship between abuse and harm?

At common law, regard may be had to the harm done to the victim for the purposes of sentencing.¹⁰² Sentencing legislation also provides for harm to the victim to be taken into account.¹⁰³ A judge's understanding of the harm

99 See J Woolley "Thinking about fantasy: are children fundamentally different thinkers and believers from adults" (1997) 68 *Child Development* 991; M Taylor "The role of creative control and culture in children's fantasy/reality judgments" (1997) 68 *Child Development* 1015; T Sharon and J Wolley "Do monsters dream? Young children's understanding of the fantasy/reality distinction" (2004) 22 *British Journal of Developmental Psychology* 293 at 294–296.

100 See Richard J McNally, *Remembering Trauma*, Harvard Uni P, Cambridge Mass, 2003 at pp 58–62.

101 (2006) 161 A Crim R 187 at [3]–[8].

102 *Siganto v The Queen* (1998) 194 CLR 656 at [29].

103 In NSW, s 3A of the *Crimes (Sentencing Procedure) Act* 1999 provides that one of the purposes of sentencing is to recognise the harm done to the victim of the crime and the community. Section 21A(2)(g) provides that an aggravating factor to be taken into account in sentencing an offender is that the injury, emotional harm, loss or damage caused by the offence was substantial.

suffered by a victim of child sexual assault, or indeed of any offence, will be an important factor in determining the sentence the offender receives.

The decisions of the NSW Court of Criminal Appeal indicate, particularly from the early 2000s onwards, a greater willingness by judges to assume that harm flows from the sexual assault of a child, and display a greater level of certainty that this harm will manifest itself over time.

This was not the position in 1990 when Hunt J wrote the leading judgment in *R v Muldoon*.¹⁰⁴ That case concerned a charge of homosexual intercourse with a boy under 10, for which the offender was sentenced to minimum term of imprisonment of two years with an additional six months. The victim impact statement before the trial judge at the time of sentence was silent on the possible emotional and psychological effects of the abuse on the victim in the future. The trial judge's sentencing remarks, as described by Hunt J, were that the experience had no doubt been traumatic, and that attention paid to details of the offence between time of offending and until trial would have exacerbated the trauma. Overall, however, the judge took the view "that whilst scars may remain they will fade in time". Hunt J held that the finding "was one which was open to the judge upon the quite unsatisfactory material placed before him". Commenting on the material placed before the sentencing judge, Hunt J said:

What would be of far more assistance to sentencing judges in these cases than the shallow, trite and apparently wholly unqualified observations produced in this case would be the results of studies conducted over a significantly broad base and over a significant period of time into the lasting effects of sexual abuse upon young children.

In 2007 in *DBW v R*, Spigelman CJ said of *Muldoon*:

The most significant thing about this judgment is its date. Unfortunately, over the last few years, the public and the courts have become much more aware of, and knowledgeable about, the effects of child sexual abuse. His Honour's observations in *Muldoon* are of no assistance today.¹⁰⁵

That shift in awareness is evident in the comments of Mason P in the 2002 case of *R v MJR*, which concerned the issue of whether an offender should be sentenced in accordance with the sentencing practice adopted at the time of the commission of the offences, or whether the court should apply current practice, notwithstanding a higher level of sentencing severity. Mason P stated that, over time, the pattern of sentences for child sexual assaults had

104 (Unrep, 13/12/1990, NSWCCA).

105 [2007] NSWCCA 236 at [39].

increased and that “this putative increase has come about in response to greater understanding about the long-term effects of child sexual abuse and incest; as well as by a considered judicial response to changing community attitudes to these crimes”.¹⁰⁶

In 2009, the Court of Criminal Appeal effectively indicated that, unless there was evidence to the contrary, harm should be assumed. In *R v King*¹⁰⁷ the court said: “[i]t should be assumed that there is a real risk of some harm of more than a transitory nature occurring”.¹⁰⁸

Whilst *R v King* was concerned with the sentencing judge’s failure to adequately appreciate the harm that flowed from the sexual assault, in *Stewart v R*¹⁰⁹ the sentence was challenged on the basis that a lack of reference to a victim impact statement in the judge’s sentencing remarks led to the conclusion that the judge had “presumed harm”. The judge’s presumption, it was argued, was irrelevant. Although remarking that findings based on the evidence would be preferable, Button J stated that, “sentencing judges are entitled to proceed on the basis that serious sexual assaults can be expected to have adverse psychological consequences”.¹¹⁰

The issue has been revisited on a number of occasions, with the court adopting an increasingly firm position.¹¹¹

The current position was stated in *R v Gavel*:¹¹²

This Court has observed that child sex offences have **profound and deleterious effects upon victims for many years, if not the whole of their lives**: *R v CMB* [2014] NSWCCA 5 at [92]. Sexual abuse of children will **inevitably give rise to psychological damage**: *SW v R* [2013] NSWCCA 255 at [52]. In *R v G* [2009] 1 AC 92, Baroness Hale of Richmond (at [49]) referred to the “*long term and serious harm, both physical and psychological, which premature sexual activity can do*”.

The evolution in the reasoning of the court is marked. Plainly the law has been catching up with the science, although as already identified, not every abused child will be profoundly harmed. But are we following the rules when we assume these consequences?

106 (2002) 54 NSWLR 368 at [57].

107 [2009] NSWCCA 117.

108 *ibid*, at [41].

109 [2012] NSWCCA 183.

110 *ibid*, at [61]–[62].

111 See *SW v R* [2013] NSWCCA 255 at [52].

112 (2014) 239 A Crim R 469 at [110] [emphasis added].

Whilst the greater recognition of the harm that results from child sexual assault by the courts is appropriate, the assessment of harm in the individual case can still give rise to problems.

In *RP v R*, the Court of Criminal Appeal held that the sentencing judge had erred in giving too much weight to a victim impact statement; “uncritically” accepting it.¹¹³ What was said to demonstrate error was an assessment by the appellate court that the contents of the victim’s statement, “went well beyond what might be regarded as the type of harm expected from the circumstances of the applicant’s offending”.¹¹⁴ In those circumstances it was erroneous for the sentencing judge to rely on it as he did. The court cites no authority, judicial, medical or otherwise, for its assessment that the harm went well beyond that which might be expected.

RP v R was cited in *R v Tuala*,¹¹⁵ which raised squarely the issue of the weight to be given to a victim impact statement when seeking to prove an aggravating factor. In the course of examining the authorities, Simpson J made some observations about the court’s shifting approach to assuming harm in the context of child sexual assault. The decisions of *R v Slack*¹¹⁶ and *R v Muldoon*, her Honour stated, were a product of their time. In the early 1990s, judges did not have the experience of dealing with child sexual abuse victims they now do. Her Honour concluded that “[s]uch damage is now assumed”.¹¹⁷

Simpson J went on to consider the role of a victim impact statement. Her Honour held that courts attached considerable weight to the forensic choices made by the parties during the sentencing process. Where no objections are made to the victim impact statement, where no questions are raised with respect to the weight to be attributed to it, and no request made to limit its use, a court would be more likely to accept it as evidence of substantial harm.¹¹⁸ And where the statement confirmed other evidence before the court, or where the harm is of the kind that might be expected, a victim impact statement may be readily accepted.¹¹⁹

113 (2013) 234 A Crim R 272 at [27].

114 *ibid*.

115 [2015] NSWCCA 8.

116 [2004] NSWCCA 128.

117 *above* n 115 at [56].

118 *ibid* at [78].

119 *ibid* at [79].

Her Honour suggested that factors which dictated that caution should be exercised before using the statement to establish substantial harm included: where there was a dispute as to the facts attested to in the statement; where the credibility of the victim is in question; where the content of the statement is the only evidence of harm; and importantly, with specific reference to *RP*, where the harm asserted in the statement “goes well beyond that which might ordinarily be expected” of the offence in question.¹²⁰

With respect, there will be difficulties if a victim impact statement can only be of assistance if it is consistent with a judge’s understanding of likely impacts, with the result that if it differs, it is either given less weight or set aside altogether. Where that occurs, judges are taking judicial notice of their own perceptions of harm, whatever may be the source of their present understanding. The very significant consequences of the abuse reported by the complainant in *RP* would come as no surprise to any of the Commissioners or counsellors of the Royal Commission.

Section 144 — a contemporary problem?

With respect to the capacity for judges to consult knowledge from other relevant disciplines, a significant development occurred with the enacting, in some jurisdictions, of the uniform evidence legislation.¹²¹ The precise scope of judicial notice with respect to legislative facts was a matter on which some judicial minds appeared to differ, as the differing views of McHugh and Callinan JJ in *Woods v Multi-Sport Holdings Pty Ltd*¹²² demonstrate. This being the case, the certainty provided by a statutory provision could be considered an advantageous development. But do we have the best provision?

The two core *Evidence Act* provisions are ss 143 and 144. Section 143 provides a judge with the capacity to inform him or herself about the law, and, as such, is not particularly relevant in the present context. The key provision is s 144 which provides:

120 *ibid* at [80]–[81].

121 Those jurisdictions are the Commonwealth: *Evidence Act* 1995; NSW: *Evidence Act* 1995; Victoria: *Evidence Act* 2008; ACT: *Evidence Act* 2011.

122 (2002) 208 CLR 460.

Matters of common knowledge

- (1) Proof is not required about knowledge that is not reasonably open to question and is:
 - (a) common knowledge in the locality in which the proceeding is being held or generally; or
 - (b) capable of verification by reference to a document the authority of which cannot be reasonably questioned.
- (2) The judge may acquire knowledge of that kind in any way the judge thinks fit.
- (3) The court (including, if there is a jury, the jury) is to take knowledge of that kind into account.
- (4) The judge is to give a party, such opportunity to make submissions, and to refer to relevant information, relating to the acquiring or taking into account of knowledge of that kind as is necessary to ensure that the party is not unfairly prejudiced.

At the very least, s 144 requires that the relevant knowledge cannot be reasonably open to question. If that condition is satisfied, it must then be either common knowledge or knowledge capable of being verified by reference to an authoritative document which cannot be reasonably questioned.¹²³

Like the proposed provision of the US Federal Rules of Evidence that provoked the criticism of Professor Davis, s 144 does not appear to recognise the distinction between adjudicative and legislative facts. The ALRC appeared to indicate that it intended the section to apply to both legislative and adjudicative facts. It acknowledged that s 144 “may have the effect of limiting the material presently relied upon by the courts in constitutional cases”.¹²⁴

There are, however, a number of commentators who have indicated that the section need not be read as applying to legislative facts. Justice Mullane, then a judge of the Family Court, wrote in 1998, that such an interpretation was unlikely given the restriction this would place on the way the High Court conducts constitutional interpretation.¹²⁵

123 *McGregor & McGregor* [2012] FamCAFC 69, at [74]: “[i]t is not open to a judge to use s 144 of the *Evidence Act* to ‘inform’ him or herself of matters in respect of which reasonable minds might differ.”

124 Australian Law Reform Commission, *Evidence (Interim)*, Report No 26, 1985, [977]. See also S Odgers, *Uniform evidence law*, 11th edn, Thomson Reuters, 2014, pp 926–927.

125 G Mullane, “Evidence of social science research: law, practice and options in the Family Court of Australia” (1998) 72 *Australian Law Journal* 434, at 443: “There is no particular indication in the *Evidence Act* itself of an intention to change or end the common law in relation to legislative fact. At common law the rules of evidence did not apply to courts determining legislative facts. The likelihood is that the courts will find that their wide common law powers to inform themselves regarding legislative facts have not been

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The author of *Cross on Evidence* also contends that s 144 can be construed so that it would not incorporate judicial notice of legislative facts. He contends that:

The effect of s 56(1) [of the *Evidence Act*] is to render admissible all evidence that is relevant, except as is otherwise provided by the legislation. Section 144 does not in terms prohibit the reception of evidence judicially noticed at common law: it is facultative, not prohibitory. Its language does not “cover the field”.¹²⁶

It is difficult, however, to reconcile this narrow reading with two decisions of the High Court: *Gattellaro v Westpac Banking Corp*¹²⁷ and *Aytugrul v The Queen*.¹²⁸

In *Gattellaro*, Gleeson CJ, McHugh, Hayne and Heydon JJ said, “there would appear to be no room for the operation of the common law doctrine of judicial notice, strictly so called, since the enactment”.¹²⁹ This is also the position that is taken in the joint judgment in *Aytugrul*.

In *Aytugrul*, French CJ, Hayne, Crennan and Bell JJ held that s 144 prevented judicial notice being taken of psychological research, examining the relative persuasive power of different forms of expression of statistical information in the context of DNA evidence. That material was consulted for the purpose of resolving the question whether the prosecution could rely on certain forms of statistical information, where that information might be considered unfairly prejudicial to the accused. However, notwithstanding that he joined with the other members of the court in *Gattellaro*, as Heydon J pointed out in his judgment, the process involved was judicial notice of legislative facts, which his Honour considered may not be controlled by s 144.¹³⁰

¹²⁵ continued from previous page

affected by the passing of the *Evidence Act*. Certainly the High Court seems unlikely to concede such powers in relation to constitutional facts where the legislature has not stated a clear intention to remove such power.”

¹²⁶ J Heydon, above n 58, at 223.

¹²⁷ (2004) 78 ALJR 394.

¹²⁸ (2012) 247 CLR 170.

¹²⁹ Above, n 127, at [17]. See also, discussion of this issue in Odgers, above n 124, 926–927.

¹³⁰ *ibid* at [73]. The joint reasons stated “[b]efore a court could take judicial notice of such a general proposition, the provisions of s 144 of the *Evidence Act* would have to be met.” (at [21]). They cited *Gattellaro* as authority for this proposition. Their Honours said that it had not been demonstrated that the methods used, and the results expressed, in the studies had attained such a degree of acceptance in the relevant disciplines to permit judicial notice of a general proposition about human understanding or behaviour this literature was said to reveal (at [20]). They held that “In this case, knowledge of the proposition in question could not be said to be ‘not reasonably open to question’ and ‘common knowledge’ or ‘capable of verification by reference to a document the authority of which cannot reasonably be questioned’.” (at [21]).

If the decisions in *Gattellaro* and *Aytugrul* are to be read as stating that, after the enacting of s 144, the common law of judicial notice no longer operates in *Evidence Act* jurisdictions, there may be significant problems for how the High Court deals with certain constitutional questions.

Given that legislative facts are relevant to statutory interpretation and fundamental to many aspects of the common law, including the rules of a criminal trial, this approach has significance well beyond the constitutional context. In short, we have a problem.

Some commentators have argued that the broad scope and application of the provision creates a “serious impediment” to reliance by appellate courts on published research pertaining to legislative facts, and doubt that this can be considered a satisfactory outcome.¹³¹ They argue that this interpretation of s 144 fails to recognise the law-making aspect of the judicial function.

Flowing from the High Court’s interpretation of s 144, and of particular concern, is the requirement that the material be “not reasonably open to question”. As Heydon J recognised in *Aytugrul*, this had not been a requirement for the reception of legislative facts at common law. This aspect of the rule gives rise to a special problem. Scientific knowledge is often disputed; “complete agreement and stability ... are not the attributes of science”.¹³² In *Maloney v The Queen*, a case in which the common law rules applied, Gageler J stated that the material relied upon need only be “sufficiently probative”.¹³³

There also appears to be a need for a mechanism to allow for non-legal material, relevant to the formulation and application of legal rules, to be considered by judges beyond the material adduced by the parties.¹³⁴ A system that requires that all material relevant to legislative fact finding be presented by the parties, before it may be considered by the judge, creates difficulties. The aim of the advocate is to win the case, not the ascertainment of any empirical truth.¹³⁵ This will inevitably colour the material counsel put forward. The adversarial system has traditionally sought the truth through mechanisms

131 Odgers, above n 124, at 927; Burns, above n 70, at 224.

132 P Sperlich, “Social science evidence and the courts: reaching beyond the adversary process” (1980) 63 *Judicature* 280, at 283.

133 Above n 62 at [353].

134 See J Monahan and L Walker, “A judge’s guide to using social science” (2007) 43 *Court Review* 156, at 163: “The exponential growth of social science research dealing with questions of relevance to the law and the increasing practice of courts in incorporating that research into legal decisions combine to make the development of a coherent scheme for the judicial management of social science information a priority for courts and scholars.”

135 P Rosen, *The Supreme Court and social science*, University of Illinois Press, 1972, p 87 cited in P Sperlich, above n 132, at 286–7.

such as cross-examination and the evaluation of witness credibility. These methods appear ill-suited to legislative fact finding.

One possible option is to reformulate the rules. That is, craft provisions that recognise the distinction between legislative and adjudicative facts. It has been suggested that r 201 could serve as a model.¹³⁶ Excluding legislative facts from the rules, however, may not be an appropriate solution, unless the common law rules are themselves clarified.

In 1969, Professor Davis was again preoccupied with the form of r 201. The proposed rule had now been redrafted so that it applied only to adjudicative facts — a development he described as “highly commendable”.¹³⁷ He was, however, troubled by the lack of clarity with respect to the rules applicable to legislative facts. Davis considered that, “[t]he basic objective of a good system of judicial notice should be to achieve the maximum possible convenience that is consistent with procedural fairness”.¹³⁸ He believed that a well-drafted statutory provision was the most appropriate way of pursuing that objective. Such a rule would not require noticed facts to be indisputable, but would ensure there was adequate opportunity for parties to be heard.¹³⁹ This is, of course, at odds with the manner in which some judges have previously approached the task.¹⁴⁰

Procedural fairness to parties is important. However, as some commentators, including Professor Davis, have acknowledged, procedural fairness may take different forms. Procedural safeguards could be less rigid when the court is dealing with legislative rather than adjudicative facts.¹⁴¹

An alternative has been proposed by Justice Kirby. His Honour has suggested that judges should adopt a protocol for the judicial function which could expand the opportunities for select groups to be heard and assist the court in its rule-making function.¹⁴² This approach has some support in the commentary.¹⁴³

136 A Serpell “Social policy information: recent decisions of the High Court of Australia” (2011) 21 *Journal of Judicial Administration* 109 at 124.

137 K Davis, “Judicial notice” [1969] *Law and the Social Order* 513 at 524.

138 *ibid* at 515.

139 *ibid* at 526.

140 See Callinan J in *Woods v Multi-Sport Holdings Pty Ltd* above n 65 at [163]–[165].

141 K Davis, above n 137, at 527; C Neeley, “Judicial notice: Rule 201 of the Federal Rules of Evidence” (1976) 28 *University of Florida Law Review* 723, 754–755; P Sperlich, above n 132, at 286.

142 M Kirby, “Judicial activism” (1997) 27 *Western Australian Law Review* 1 at 18.

143 A Serpell, above n 136, at 124–125.

Other options put forward include the maintenance, by courts, of their own research facilities, more liberal use of interveners and the power for the court to appoint an inquirer to inquire and report back to it.¹⁴⁴

Absent procedural reform, one possible way to ensure that judges are applying law informed by scientific knowledge is for Parliaments to provide, through Law Reform Commissions or other processes, for the development of draft legislation modifying the substantive law in areas where Parliament perceives that the law has lagged behind. The *Jury Directions Act* 2015 passed by the Victorian Parliament is a recent example. The reforms made by the Act were, in part, based on the results of a project led by Weinberg J of the Victorian Court of Appeal.

Scientists across every discipline are continually adding to the knowledge which can assist our judicial processes and outcomes. Our objective must be to ensure that the law has both the capacity and the flexibility to respond in an informed and beneficial manner to those changes.

144 J Doyle, above n 71, at 209.